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ABSTRACT

The illustrated pamphlet briefly reviews the laws relevant to the obligations of those responsible for educating, habilitating, and employing hearing impaired developmentally disabled persons. Aspects discussed include the Education for All Handicapped Children Act (P.L. 94-142), Sections 503 and 504 of the Rehabilitation Act of 1973, federal funding, mainstreaming, the equal protection clause of the Fourteenth Amendment, the Eighth Amendment's prohibition of cruel and unusual punishment, habilitative versus custodial care, affirmative action, individualized education programs, and case law. (DLS)

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A Guide to the Legal Rights of Hearing Impaired Developmentally Disabled Persons For Educators, Habilitation Specialists, Employers

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By Edward M. Ober and Joseph P. Perine

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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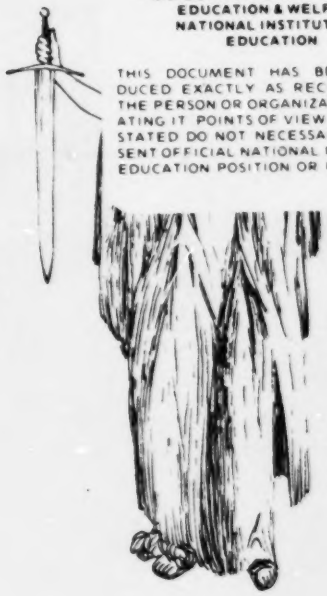

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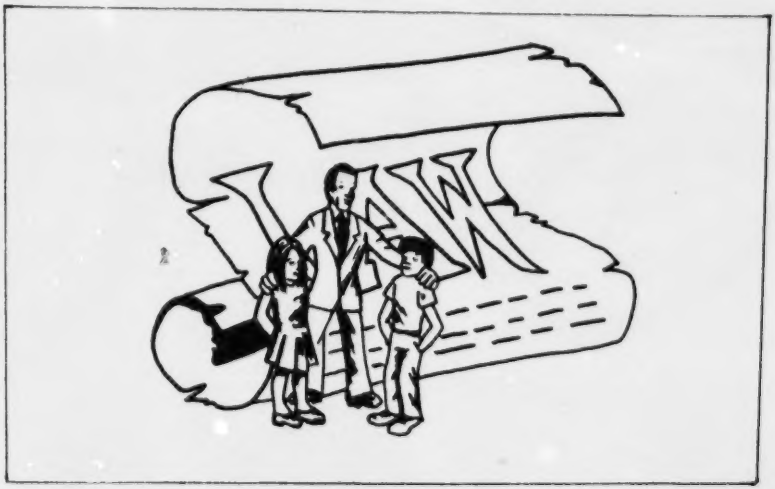
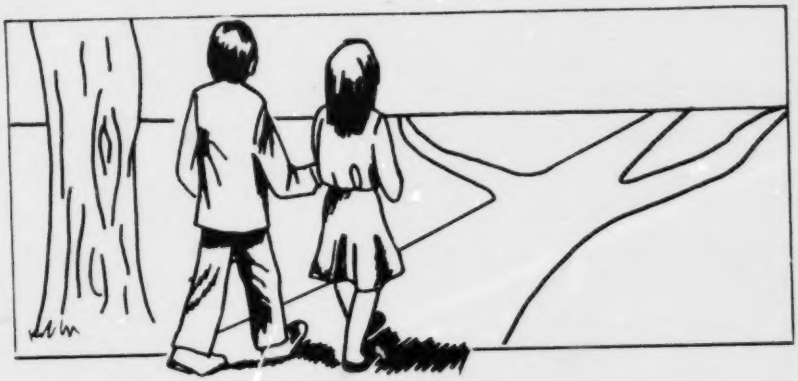
A Guide to the Legal Rights of Hearing Impaired Developmentally Disabled Persons For Educators, Habilitation Specialists, Employers

By Edward M. Ober and Joseph B. Perine

This brochure is for you, the persons responsible for education, habilitating, and employing the hearing impaired developmentally disabled person. This brochure is about laws relevant to your obligations.



The laws concerning the handicapped have developed at a fast rate, much faster than have the attitudes of society in general. Disabled persons, in the eyes of the law, are no longer relegated to second-class citizenship. Decisions of the courts and congressional legislation have responded to the unique needs of handicapped persons by weaving for them a special cloak of protection. So don't think of the laws that affect the hearing impaired developmentally disabled as confining; think of them as expanding the road to acceptance and equal treatment in a world dominated by the nonhandicapped.

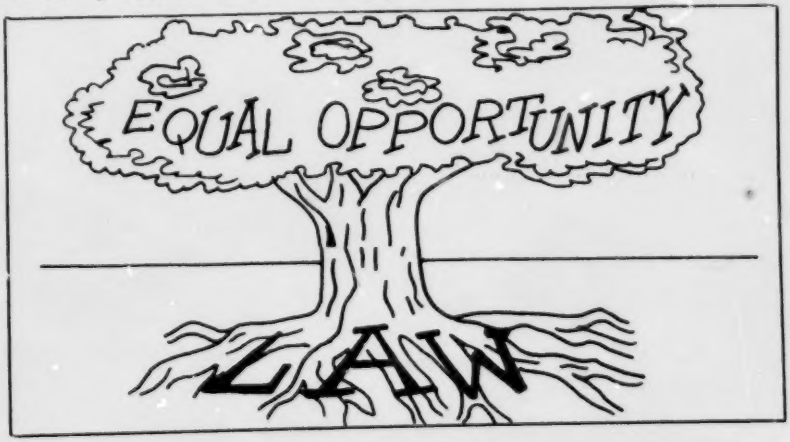


EDUCATION

The Supreme Court of the United States has said this about education:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

These words spoken twenty-four years ago in addressing the problems of racial segregation in the public schools have become the foundation for guaranteeing equal educational opportunities for the handicapped. Building upon these words, the federal courts developed a tradition of recognition that the disabled have, in the educational area, the same civil rights as the nonhandicapped. The right to equal educational opportunity for persons who are hearing impaired and developmentally disabled is firmly rooted in the law.



Congress responded to these federal court decisions by passing Public Law 94-142, the "Education For All Handicapped Children Act" of 1975. It was

described as an Act to assure that all handicapped children receive a free appropriate public education. Its mandates, when understood and followed, will do just that.

By September 1, 1978, states receiving funds under the Act must provide a free appropriate public education to all handicapped children within their jurisdiction, between the ages of three and eighteen. Disabled persons ages nineteen through twenty-one must receive the same by September 1, 1980. A state, however, does not have to provide an education to disabled children, three to five and nineteen to twenty-one years old, if their state laws do not require it to provide education to nonhandicapped children of those ages.

Federal funds are the incentive for the states to comply with the Act. Money is given to the states on an increasing basis over the next several years. The law is

emphatic in requiring that these funds must first be spent on educating those handicapped children who are currently not receiving any education (the unserved). Second priority is given to the most severely handicapped within each disability who are receiving an inadequate education (the underserved). Public Law 94-142 will open the school doors to many hearing impaired developmentally disabled children who have been ignored for far too long.

The Act clearly establishes several important mandates to assure the provision of a free appropriate public education to every handicapped child within the state. The child must receive both special education and related services which will help the child with the learning process which can then be used to his or her advantage in the community.

The Act requires that, to the maximum extent appropriate, handicapped children are educated with children who are not handicapped. This concept has come to be known as the "least restrictive environment," the "least restrictive alternative," or "mainstreaming."

Public Law 94-142 also mandates that an Individualized Educational Program (IEP) be developed for each handicapped child for which the state is receiving education funds. The IEP is a statement written by a representative of the local educational agency, the child's teacher, the parents or guardian of the child, the child whenever appropriate, and any other individuals that the parent or agency wish to include. These persons must agree on the detailed ingredients necessary to a *free, appropriate, public education* for the disabled child.

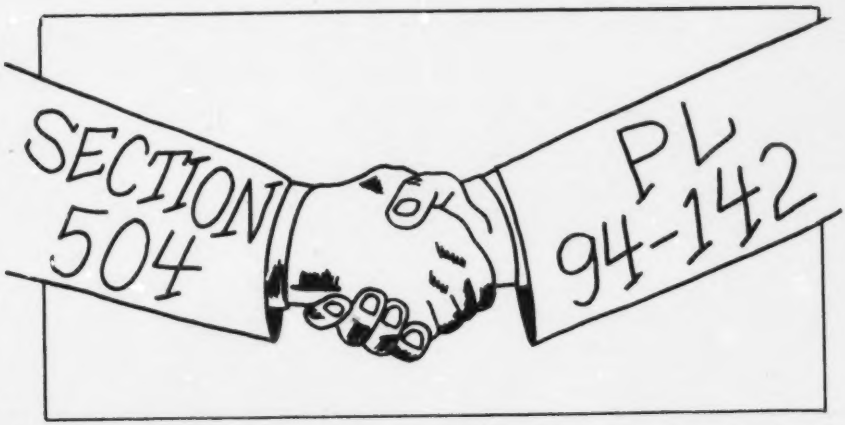
To further ensure that the child is provided the desired education, the Act outlines detailed procedural safeguards which may be invoked to clarify differences between the child's parents and the educational system. The policies embodied by the Act are vital ones, and the elaborate due process safeguards offer the means to guarantee successful implementation of the law.

Section 504 of the Rehabilitation Act of 1973 goes hand in hand with the Education for All Handicapped Children Act of 1975.

Its prohibition against discrimination on the basis of handicap is the major force existing today for guaranteeing civil rights for the disabled.

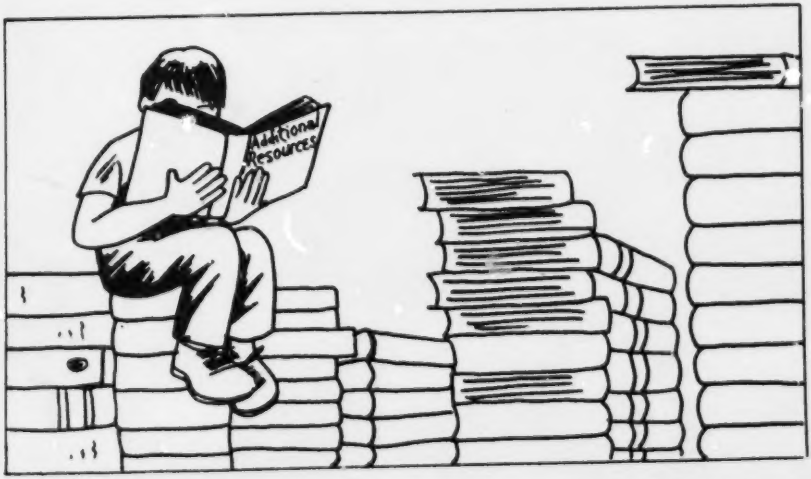
Section 504 reads:

No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.



With its long awaited regulations, Section 504 addresses a variety of basic rights, one of which is education. Subpart D of the regulations, pertaining to preschool, elementary, and secondary education, requires almost the same things as the Education Act.

Subpart E of the Section 504 regulations, which addresses postsecondary education, is especially important because Public Law 94-142 does not apply to postsecondary education. Under Subpart E, qualified handicapped persons may not be denied admission, or be subjected to discrimination in admission or recruitment processes, on the basis of a handicap. Similiarly, the university or other postsecondary program may not, once a qualified handicapped person is admitted, exclude him or her from or subject him or her to discrimination under any educational or extracurricular program.

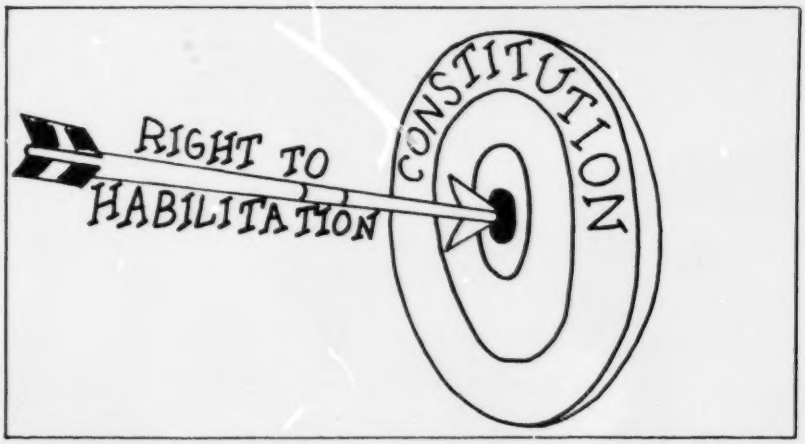


A recipient of federal funds must also modify academic requirements to ensure that they do not discriminate against disabled students. This requirement is particularly important to a hearing impaired developmentally disabled student because it guarantees that the university will make adjustments to accommodate his or her communication limitations. Under this section of the regulations, recipients must also ensure that auxiliary aids are provided to disabled students so that equal participation is guaranteed. Auxiliary aids include interpreters or other effective methods of making orally delivered materials available to HIDD students.

The precedents created by the federal courts, the Education for All Handicapped Children Act of 1975, and Section 504 of the Rehabilitation Act of 1973 and its regulations explain beyond a doubt that handicapped persons are entitled to receive an education of the same quality as society provides the nonhandicapped.

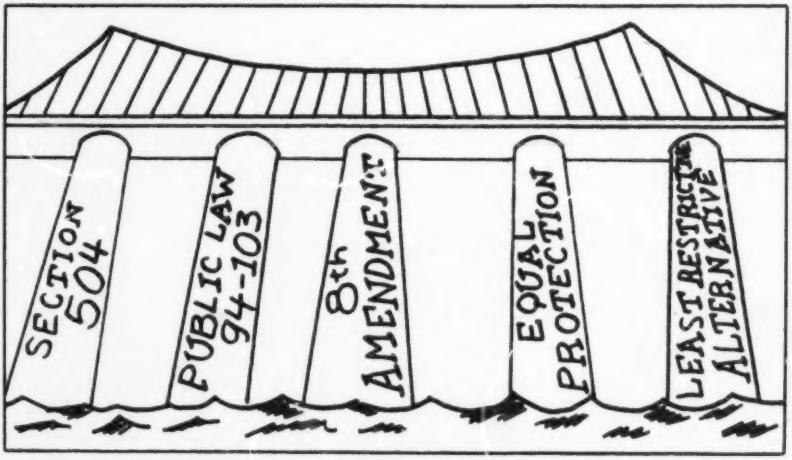
HABILITATION

Because nine of every ten mentally retarded persons who are also severely hearing impaired are confined to public institutions for the mentally retarded, vigorous efforts must be made to guarantee that residents in these facilities receive habilitative rather than simply custodial care. In recent years, the publicity given the inhumane conditions of many of these institutions and the growing awareness that they do little to improve their resident's condition have given rise to an upsurge in litigation. This litigation has been based on the belief that mentally ill individuals who are involuntarily committed have the constitutional right to treatment, while mentally retarded persons have a constitutional right to habilitation.



The right, which had its beginning in an article written in 1960 by Dr. Morton Birnbarm, found its primary motivation in the landmark decision of *Wyatt v. Stickney*. A federal district court found that persons committed involuntarily to institutions for the mentally retarded have a constitutional right to habilitation. In the court's words, "Because the only constitutional justification for civilly committing a mental retardate . . . is rehabilitation, it follows ineluctably that once committed such a person is possessed of an inviolable constitutional right to habilitation." To remedy the poor conditions of the institution involved, the *Wyatt* court developed a set of minimum standards defining the care and training to be provided the residents, and a human rights committee was created to assure that these standard were maintained.

The decision in that case has served as an invaluable precedent in this area of the law. Despite the Supreme Court's consistent refusal to entertain the issue, federal and state courts have overwhelmingly acknowledged the existence of a right to habilitation. Several theories have evolved to support the right to receive habilitative care.



Many right-to-habilitation cases are based upon the belief that the due process clause of the Fourteenth Amendment requires that residents of institutions for the mentally retarded are habilitated in the least restrictive alternative possible. The court in *Welsch v. Likens* said it well:

> *The due process clause does no more than require that State officials charged with obligations for the care and custody of civilly committed persons make good faith attempts to place such persons in settings that will be suitable and appropriate to their mental and physical conditions while least restrictive of their liberties.*

This theory has been used to deinstitutionalize large state facilities and to challenge state commitment statutes. The due process challenge has also been utilized, as in *Wyatt v. Stickney*, to establish standards of care to be provided by these institutions for persons who cannot be placed in the community.

The equal protection clause of the Fourteenth Amendment has also been found to support a constitutional right to habilitation. Equal protection requires that retarded persons receive at least as much education, care, and training (i.e. habilitation) as the state provides to the nonhandicapped. One court, drawing analogies to the school desegregation cases, reasoned that confining mentally retarded individuals to isolated institutions without providing minimally adequate habilitation was a form of separate but not equal segregation.

The Eighth Amendment's prohibition of cruel and unusual punishment has also been invoked. The argument has successfully been made that if an institution confines retarded persons without providing adequate habilitation, it is tantamount to punishment for the status of being mentally retarded.

Statutory authority has likewise been employed by advocates in right-to-habilitation cases. As in the field of education, Congress followed the example set by the federal courts and codified the right to habilitation. Section 201 of the Disabled Assistance Bill of Rights Act (Public Law 94-103) states that "[P]ersons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities." Section 504 of the Rehabilitation Act may also be used to bolster an equal protection argument.

In addition to a constitutional right to habilitation, several courts have been willing to recognize a constitutional right to protection from harm. Premised upon the Eighth Amendment, this right is very similar to, and results in the same relief as, the right to habilitation based upon that amendment.

One or all of these theories may be used when challenging the care provided and conditions inside institutions for mentally retarded persons. Advocates for hearing impaired mentally retarded individuals should employ these theories to assure that these persons receive habilitative care.

EMPLOYMENT

One of the most patently offensive conditions inside many of the nation's institutions is that of requiring resident-workers to perform productive labor without justly compensating them. The National Association for Retarded Children has asserted that this condition is prevalent "in facilities across the country." The labor is usually associated with the maintenance of the institution, such as working in the kitchens, dining rooms, laundries, farms, dairies and wards.

It is critical that advocates for persons who are hearing impaired and developmentally disabled who are institutionalized, as well as all advocates for the mentally retarded and mentally ill, work to prevent this offensive practice. Unfortunately the law in this area is particularly unstable and tolerant of abuses.

Souder v. Brennan, a case decided in 1973, began a movement by the courts in the direction of recognizing that resident-workers should be justly compensated for their labor. That case said that resident-workers in an institution for the mentally retarded were entitled to be paid the minimum wage and overtime compensation mandated by the 1966 Amendments to the Fair Labor Standards Act. *Souder v. Brennan* was hailed as a major decision, but its strength has now become questionable due to the recent Supreme Court decision, *National League of Cities v. Usery*.

The Supreme Court, in that case, held that the 1974 Amendments to the Fair Labor Standards Act were invalid because they operated "to directly displace the state's freedom to structure integral operations in areas of traditional government functions." In finding this, the Court overruled an older case which held the 1966 Amendments to be valid exercise of Congress' power. With that case overruled, the breadth of the older amendments became suspect. It was those amendments which were the foundation of the favorable decision in *Souder v. Brennan*. Thus the *Souder* doctrine may be negligible, and one side effect of the Supreme Court's decision in *National League of Cities v. Usery* may be to allow the states to ignore the Fair Labor Standards Act and structure their own pay scales for public institutions.

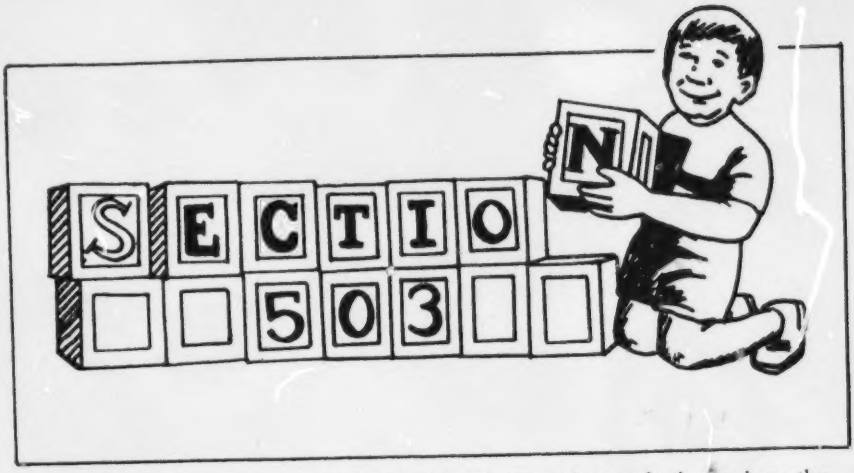
Advocates are badly needed to help extinguish the possibility of abuse in this area. Litigation in the courtroom is one option, but its potential success is questionable. Legislation must be called on to remedy this situation. An amendment to the Fair Labor Standards Act is sorely needed as a clear mandate that resident-workers must be paid at least a minimum wage for their labor. This is one of the few major areas where the law has not responded to the special needs of the handicapped population. Individuals who are hearing impaired and

developmentally disabled, as well as all handicapped persons, need people to advocate for them.

The law is much more sensitive to those hearing impaired developmentally disabled persons who are employed in the community. HIDD persons capable of productive work should be given an opportunity to make an economic contribution to society, while securing a decent living. In general, these individuals are well suited for many types of jobs, especially those tasks requiring minimal communication abilities. Current federal legislation is powerful enough to guarantee that HIDD persons are given the opportunity to realize successful employment.

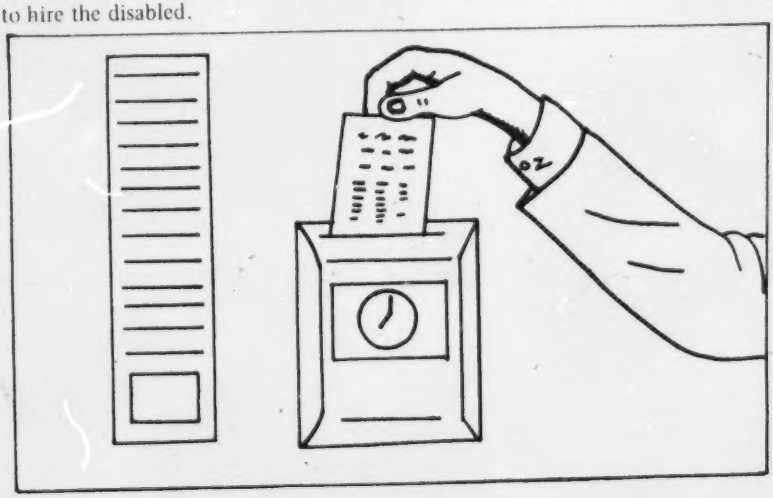
Section 503 of the Rehabilitation Act of 1973 requires that governmental contractors and subcontractors, with contracts exceeding $2,500, take affirmative action to employ and advance in employment qualified handicapped individuals. All contracts and subcontracts must include a specialized affirmative action clause announcing this policy. Furthermore, every government contractor or subcontractor with a contract of $50,000 or more and having fifty or more employees must implement an affirmative action program at each of its establishments.

To comply with these affirmative obligations, an employer must make reasonable accommodations to the physical and mental limitations of an employee or applicant unless the contractor can demonstrate that making the adjustment will work an undue hardship on his or her business. Non-compliance with this, or any other requirement of Section 503 may result in one of several sanctions including termination of the contract.



Section 504 of the Rehabilitation Act and its regulations further endorse the mandates of Section 503. Whereas Section 503 states its requirements in terms of affirmative action, Section 504 requires non-discriminatory action. No qualified handicapped person may be subjected to discrimination in any of the following activities: recruitment, advertising, processing of applications, hiring, alteration in job status, compensation, job assignments, lines of progression and seniority, leaves of absence and sick pay, fringe benefits, selection and financial support for training and conferences, and employer sponsored activities including social events.

Sections 503 and 504 of the Rehabilitation Act forbid employment discrimination against hearing impaired developmentally disabled persons, and mandate affirmative action programs to secure jobs for these persons. Employers must be made aware of these obligations, and must initiate affirmative measures to hire the disabled.



CONCLUSION

The hearing impaired developmentally disabled population has, as do all handicapped individuals, the same basic civil rights as the non-handicapped. Stating this, however, is by itself not enough. Affirmative steps to provide for and accommodate the special needs of these persons is vital to erase a history of neglect and ignorance.

The information in this brochure has been taken from a larger work entitled *Legal and Constitutional Rights of Hearing Impaired Developmentally Disabled Children and Adults.* It covers in depth the laws reviewed here and addresses additional ones. Like this publication, it is designed to educate the HIDD population and those who touch their lives. Copies of the complete document are available upon request from:

Model Demonstration Program
The Rehabilitation Center
College of Education
The University of Arizona
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Now that the laws have responded to the needs of this minority population, our time has come. It is up to us to create a place in society for persons who are hearing impaired and developmentally disabled.

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